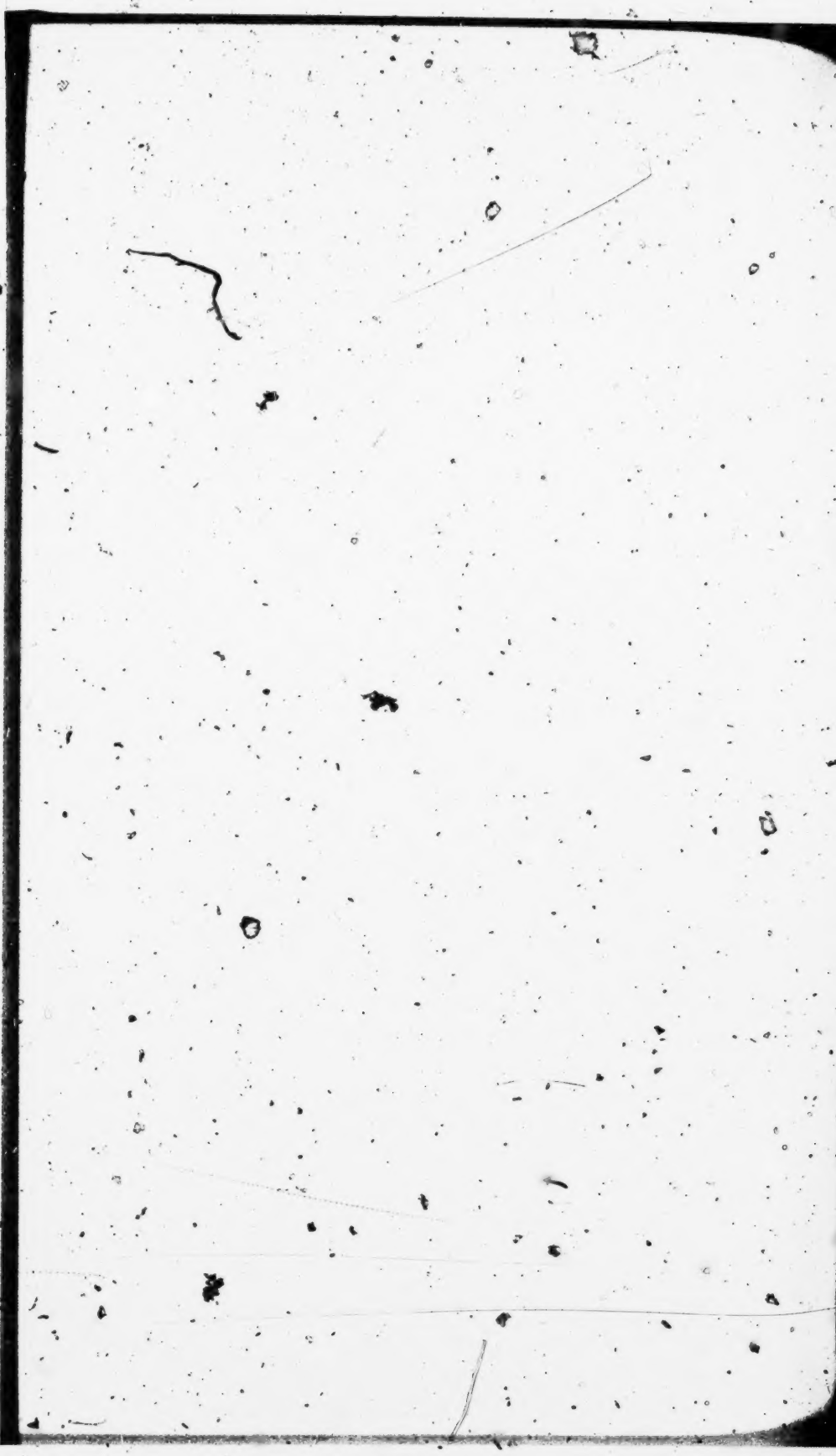

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 704.

THE UNITED STATES, *Petitioner*,

vs.

BARNIM KOMST, GERTRUDE LUCKHARDT AND ILKA WICHMANN, AND HOWARD SUTHERLAND, Alien Property Custodian.

BRIEF FOR RESPONDENTS.

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BARNIM KOMST, GERTRUDE LUCKHARDT AND ILKA WICHMANN, AND HOWARD SUTHERLAND, Alien Property Custodian.

BRIEF FOR RESPONDENTS.

Deductibility of the California Inheritance Tax Under the Revenue Act of 1916 for Federal Estate Tax Purposes.

This is a suit to recover Federal estate taxes in the sum of $23,563.03, together with interest thereon, and the basis of the action is the refusal of the Commissioner of Internal Revenue to allow as a deduction from the gross estate in arriving at the net estate subject to tax the sum of $261,811.42 paid to the proper officers of the State of California as an inheritance tax under the laws of said State. The decedent, Rosa von Zimmermann, died on April 25, 1917, and Federal estate taxes were paid under the Revenue Act of 1916, as amended.

Section 203 (a) (1) of the Revenue Act of 1916 provides that the value of the net estate shall be determined by deducting from the value of the gross estate among others, "claims against the estate and such other charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered; * * *."

It is earnestly contended that the California inheritance tax paid was a claim or charge against the estate, and is properly allowable as a deduction for Federal estate tax purposes under the Revenue Act of 1916.

The original inheritance tax act of California was the act of 1893. This act, as well as subsequent acts, was patterned after the New York Act. The acts of 1905, 1911 and 1913 were complete revisions. The estate of Rosa von Zimmermann, deceased, was subjected to the California inheritance tax act of June 16, 1913, as amended in 1915 (General Laws of California, Deering, 1915). This act in its essential features is identical with the New York acts. The pertinent provisions of the act of June 16, 1913, as amended in 1915, are as follows:

> "Sec. 2. The tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted to be paid to the treasurer of the proper county. * * *
>
> "Sec. 4. Such taxes shall be and remain a lien upon the property passed or transferred until paid, and the person to whom the property passes or is transferred, and all administrators, executors and trustees of every estate so transferred or passed shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. * * * The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted; and provided, that in determining said

market value no deduction shall be made for any family allowance made out of said estate.

Sec. 6. This section imposes graduated rates on the market value of the property in excess of certain exemptions on the interest passed or transferred according to the value of the property transferred and the relationship of the person entitled to the beneficial interest in such property.

"Sec. 8. All taxes imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of 10 per cent per annum shall be charged and collected from the time said tax accrued; * * * but in all cases where the executors, administrators, or trustees do not pay such taxes within eighteen months from the death of the decedent, shall be required to give a bond in the form and to the effect prescribed in subdivision (a) of Section 9 of this Act for the payment of said taxes, together with interest.

"Sec. 10. (a) Any administrator, executor, or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid; if, however, such legacy be given in money to any person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the superior court to make an apportionment, if the case require it, of the sum to be paid into

his hands by such legatees, and for such further order relative thereto as the case may require.

"(b) All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said taxes, in the same manner as they may be enabled by law to do for the payment of debts of the estate, and the amount of said tax shall be paid as hereinafter prescribed. * * *

"(c) Every sum of money retained by an executor, administrator or trustee or paid into his hands for any tax on property, shall be paid by him within thirty days thereafter to the Treasurer of the County in which the probate proceedings are pending.

"Sec. 11. Upon the payment to any county treasurer of any tax due under this act, such treasurer shall issue a receipt therefor in triplicate, one copy of which he shall deliver to the person paying the tax, and the original and one copy thereof he shall immediately send to the controller of state, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and said controller shall retain one of said receipts, and the other he shall countersign and seal with the seal of his office, and immediately transmit to the clerk of the court fixing such tax. And an executor, administrator or trustee shall not be entitled to credits in his accounts nor be discharged from liability for such tax, nor shall said estate be distributed unless a receipt so sealed and countersigned by the controller, or a copy thereof certified by him, shall have been filed with the court. Any person shall, upon payment to the county treasurer of the sum of fifty cents, be entitled to a duplicate, or copy, of any receipt that may have been given by said treasurer for the payment of any tax under this act."

The Courts of California have described the inheritance tax by various terms. The latest expression of the Supreme Court of California is contained in *Estate of Letchworth*, 201 Cal. 1, decided April 2, 1927, wherein it was stated, "the tax imposed by the inheritance tax statute is

on the transfer of the property or on the right to succeed to the proprty rather than on the property itself." This case arose under the California inheritance tax act of 1921, but that act so far as the character of the tax is concerned, is identical with the 1913 Act under which the estate of Rosa von Zimmermann was taxed.

There is no question but that a decision of a State court deciding whether or not a certain inheritance tax is a charge against an estate is entitled to great weight. But when a State court upholds the constitutionality of an inheritance tax act by stating that the tax is one on the right to transmit property, or on the right to receive property, or on both the right to transmit and receive property, such a decision affords little light in the judicial determination of whether or not the tax is a charge against the estate. The State reports are replete with decisions containing expressions descriptive of inheritance taxes, but such decisions are without value and inapplicable unless there was a controversy as to whether the tax was a charge against the estate.

Under the law of California the tax is not measured by the value of the property which the person actually receives. It becomes fixed as of the date of death and a certain portion of the property is contributed to the State. It was so held in the *Estate of Hite*, 159 Cal. 392, which is an authority entitled to weight. This case involved an appeal from an order fixing the amount of inheritance tax due under the Inheritance Tax Act (Stats. 1905, p. 341) from the various beneficiaries under the will of deceased. The appeal was by the residuary legatees and by the administrator with the will annexed. The lower court in fixing the amount of inheritance tax included in the valuation of the estate upon which the tax should be computed the sum of $98,991.10 left by the deceased, which had never come into the possession of the administrator with the will annexed, but which had been appropriated to his own use within a year of his appoint-

ment by the executor of the will of deceased. The whole of said sum of $98,991.10 was lost to the estate as the executor was without bond. The sole question in the case was whether the lower court's action is including the sum of $98,991.10 in the estate subject to tax was correct. The Court held that the amount was properly included. The Court, in the course of its opinion, said:

> "The exact question thus presented has apparently never before arisen in this or any other state. * * *
>
> "* * * We can perceive no warrant in the Inheritance Tax Act for holding that the destruction or loss of a part of the property before the actual delivery of possession to the beneficiary can affect the question of amount of tax, any more than would a material depreciation in its value affect it. * * * The residuary legatees here are seeking to take under the will of deceased all the residue of his property after the payment of debts, expenses of administration, and other legacies. We have here no question of the effect of a renunciation of a legacy. The residuary legatees are enforcing the provisions of the will in their favor. Under that will the residue of the estate vested in them at the instant of death of their testator, and the amount of succession tax which they are required to pay must be determined upon the conditions existing at that time. * * *
>
> "We see no force in the claim of the administrator with the will annexed that it cannot deduct the tax so far as the $98,991.10 is concerned from the other property in its hands which constitutes part of the residuum of the estate and belongs under the provisions of the will to the residuary legatees. The residuary legatees are bound to pay as a condition to receiving possession of the residue of the estate, a succession tax determined on the basis hereinbefore stated, and the administrator is expressly authorized and obligated to deduct the whole tax of any such legatee from the property in its possession belonging to him under the residuary clause of the will."

This decision demonstrates that under the law of California the inheritance tax is not one on a legatee on the value of property which he actually and physically receives on distribution, but one which attaches at the instant of death of the decedent, and is based on the value of the property at that time. The case actually decides that the tax is a charge against the estate, because if the executor had absconded with all the decedent's property excepting enough to pay the inheritance tax no different rule would apply.

This decision has the same legal effect as in *Re Hubbard,* 234 N. Y. 179, relied upon by the Supreme Court in *Keith v. Johnson,* 271 U. S. 1, where it was held that, "The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time." In *Keith v. Johnson, supra,* it was held that the New York transfer tax was deductible under the Revenue Act of 1916, and in *United States v. Mitchell,* 271 U. S. 9, it was held that the Texas inheritance tax was deductible under the Revenue Act of 1916.

In *Keith v. Johnson, supra,* Mr. Justice Butler, who delivered the opinion of the Court, said:

> "By indicating that the latest decisions of the State courts will be followed here as binding, it is not intended to intimate that a different view is entertained as to the construction properly to be given the state law. *In fact we agree with that construction*; and feel justified in so saying as the same question arises in another case—No. 470, the opinion in which is announced concurrently with this one—on a substantially similar statute of a state where there has been no authoritative construction by the state courts. . . ." (Italics ours)

In *United States v. Mitchell, supra,* decided concurrently with *Keith v. Johnson, supra,* holding the Texas inheri-

tance tax deductible under the Revenue Act of 1916, it is stated:

> "We are of the opinion that, in respect of the matter under consideration, the Texas inheritance tax law cannot be distinguished from the New York transfer tax law. * * *."

In *Lederer v. Northern Trust Co., et al.*, 262 Fed. 52, certiorari denied, 253 U. S. 487, it was held that the Pennsylvania inheritance tax was deductible under section 203 of the Revenue Act of 1916 in determining the value of the net estate subject to tax.

The subject of the deductibility of the Massachusetts inheritance tax for Federal estate tax purposes under the Revenue Act of 1916 was argued before this Court on February 23, 1932, in *Leach v. Nichols* (No. 468, October Term, 1931). This decision is in conflict with *Merrill v. United States*, 66 C. Cls. 136, in which the Court of Claims held that the Massachusetts inheritance tax is deductible under the Revenue Act of 1916.

In the case at bar, the authorities of the State of California obviously held the California inheritance tax to be a charge against the estate. The decedent, at the time of her death on April 25, 1917, was a German alien enemy resident in California. All the right, title and interest of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, in and to the estate of the decedent was seized by the Alien Property Custodian on June 12, 1918. These respondents were German alien enemies resident in Germany. The California inheritance tax was levied on the entire net value of the estate transmitted at death, notwithstanding the fact that their property was seized by the Government. In view of the existence of war between Germany and the United States, and the prevention of communication, the Germany alien enemy heirs had no knowledge of the inheritance of the property or the payment of the California inheritance tax.

The Claim for Refund is not Barred From Allowance by the Statute of Limitations.

While the claim for refund was filed more than four years after the tax was paid, this is a case which involves former German alien enemies, and it is a well established rule of law that where alien enemies are under a legal disability from asserting their rights, the period of the disability should be deducted from any general statute of limitations.

It is the contention of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, that there should be deducted from the four-year period of limitation, the time from the payment of the tax to March 4, 1923, the effective date of the Winslow Act, which for the first time restored any of these respondents' property rights, and further, that the four year period of limitation does not apply to the Alien Property Custodian.

Rosa von Zimmermann, at the time of her death on April 25, 1917, was a German alien enemy. By the terms of her will, the residue of her estate, after the payment of debts and certain legacies, was left to the aftermentioned respondents, who were German alien enemies resident in Germany. The residue of her estate vested in these respondents immediately upon her death on April 25, 1917. (*Estate of Hite,* 159 Cal. 392.) When the Alien Property Custodian, pursuant to the Trading with the Enemy Act, as amended, and the Executive Order dated February 26, 1918, made demand upon the executors on June 12, 1918, to convey, transfer, assign, deliver and pay to him all the right, title and interest of the plaintiffs in and to the estate of the decedent, such demand served to vest title to the residue of the estate in the Alien Property Custodian, who had all the powers of a common law trustee in respect to the same.

The Federal estate taxes which are the subject of this suit form a part of the residue of the estate, and the de-

mand of the Alien Property Custodian effectively covered the same. The California tax was paid on October 23, 1918, so that this cause of action did not accrue until after the seizure by the Alien Property Custodian. While the Alien Property Custodian has no right to seize property after the termination of the war, it has been held that where he made demand for property prior to the end of the war, he is entitled to receive such property after the war, because the demand served to give him title. It is for this reason that he is entitled to receive the amount of any recovery in this case. That the Federal estate taxes form a part of the residue of the estate and that there were ample funds with which to pay the debts and legacies to persons other than the plaintiffs herein is clear from the agreed statement of facts, because the residue of the estate was physically delivered to the Alien Property Custodian on October 26, 1922, the date on which the executors were discharged. After the Alien Property Custodian served his demand on the executors on June 12, 1918, the property of the enemy heirs was in the custody of the law, subject to the disposition of Congress. The executors had no right to prosecute a claim for refund of Federal estate taxes on behalf of the enemy heirs, because title to this fund was in the Alien Property Custodian, since it formed a part of the residue of the estate. Aside from this fact, it is maintained that no executor, adminstrator, guardian, trustee, or any other person, could prosecute during the period of the war any claim on behalf of an alien enemy. In the instant case, the executors could only assert the rights of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, and they had none with respect to the taxes erroneously collected until March 4, 1923. The petitioner argued that if there is any suspension of the four year period of limitation, it ended on July 2, 1921, the date fixed by the President's proclamation on November 14, 1921, as the termination of the war. It is agreed that this would be true under the decisions

if the property had not been seized or if the property rights had been restored on July 2, 1921. The property was seized on June 12, 1918, and the act of March 4, 1923, was the first to restore any of the property rights. Hence, March 4, 1923, should be assigned as the beginning of the operation of the statute. (*Farbwerke Vormals v. Chemical Foundation*, 283 U. S. 152; *Behn, Meyer & Co. v. Miller*, 266 U. S. 457; *United States v. Chemical Foundation*, 272 U. S. 1; *In re Sutherland*, 21 F. (2d) 667; *Thoms v. Sutherland*, 52 F. (2d) 592; *Sigg-Fehr v. White*, 285 Fed. 949; *Garvan v. $20,000 Bonds*, 265 F. 477; *Central Union Trust Co. of New York v. Garvan*, 254 U. S. 554; *Stoehr v. Wallace*, 255 U. S. 239; *Birge-Forbes Co. v. Heye*, 251 U. S. 317; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Swiss National Insurance Co. v. Miller*, 267 U. S. 42; *Great Northern Railway Co. v. Sutherland*, 273 U. S. 182; *Salamandra Ins. Co. v. New York Ins. & Trust Co.*, 254 Fed. Rep. 852; *Kohn v. Jacob & Josef Kohn, Inc., et al.*, 264 Fed. Rep. 253; *Garvan v. Marconi Wireless Telegraph Co.*, 275 Fed. Rep. 486; *Miller v. Schutte*, 287 Fed. Rep. 604; *Application of Miller*, 288 Fed. Rep. 760; *Munich Reinsurance Co. v. First Reinsurance Co.*, 6 F. (2d) 742; *Farmers' Loan & Trust Co. v. Hicks et al.*, 9 F. (2d) 848; *Sutherland v. Guaranty Trust Co. of New York*, 11 F. (2d) 696; *Hicks v. Anchor Packing Co.*, 16 F. (2d) 723; *Baltimore & Ohio R. Co. v. Sutherland*, 18 F. (2d) 560; *Sturchler v. Sutherland*, 19 F. (2d) 999; *In re Sutherland*, 23 F. (2d) 595; *Richmers Rhederei Actien Gesellschaft v. Sutherland*, 23 F. (2d) 989.) These cases construe the Trading with the Enemy Act, as amended, and are quite important in determining the rights and liabilities of alien enemies with respect to their property which had been seized.

Federal estate taxes in the amounts of $138,908.51 and $5,981.27 were paid by the executors to the Collector of Internal Revenue at Los Angeles, Calif., on April 19, 1918, and September 10, 1918, respectively.

On December 27, 1923, the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, filed claims for refund on the ground that the gross estate was overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim for refund on the same ground. There was included in the estate and on which tax was paid an item of $979,047.39 representing the value of certain Russian, Austrian and German securities as at the date of the decedent's death, which had depreciated to a paltry sum. It was felt that these securities were overvalued, but no substantial evidence could be secured, and the ground was abandoned. After these claims were filed, the Commissioner of Internal Revenue raised the question of the validity of the claims as they were filed after the four year period. The Solicitor of Internal Revenue (now General Counsel of the Bureau of Internal Revenue) in an opinion dated June 13, 1924, a copy of which is attached hereto as Appendix "A", held that the claims were not barred from allowance. These claims did not mention the ground which is the subject of this suit. However, on November 23, 1925, the Commissioner was advised by letter on behalf of the Alien Property Custodian and the other respondents that claim for refund was also made on the ground that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax. This served as an amendment of the prior claims and pointed out to the Commissioner a definite ground for refund. There can be no serious question but that this served as an informal claim for refund. (*Stern v. United States*, 31 F. (2d) 960; *Felt & Tarrant Mfg. Co. v. U. S.*, 283 U. S., 269). On January 7, 1926, a formal claim for refund was filed by the Alien Property Custodian based on the ground of the deductibility of the California inheritance tax. The Estate of Rosa von Zimmermann was re-

ferred to, and to all intents and purposes it was just as effective as if the heirs' names had been mentioned.

The claim was signed by the attorney in fact for both the Alien Property Custodian and the other respondents, which fact was well known to the Commissioner. Many thousands of dollars have been refunded on claims filed by the Alien Property Custodian since the Winslow Act of March 4, 1923. On July 11, 1928, the Commissioner rejected the claim for refund on the merits—not on the ground that the claim was filed after the four year period—and suit was instituted within the two year period. Since the rejection of the claim and while the suit was pending, the General Counsel of the Bureau of Internal Revenue recommended the allowance of the claim and a motion to dismiss was delivered to the Department of Justice to be held in escrow awaiting payment, but the Commissioner has now definitely refused to settle the case.

If there is deducted from the four year period for filing claims the time from the payment of the tax to effective date of the Winslow Act, March 4, 1923, then the claims on the ground of the deductibility of the California inheritance tax were filed in due time.

It is clear from the Trading with the Enemy Act, as amended, pertinent parts of which are set forth below, that the residue of decendent's estate became vested in the Alien Property Custodian upon his demand on June 12, 1918, and that the rights and remedies of the plaintiffs were absolutely suspended until the Act of March 4, 1923.

> "That the President is authorized to appoint, prescribe the duties of, and fix the salary * * * of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the gen-

eral direction of the President and as provided in this Act. * * * (Act Oct. 6, 1917, c. 106, sec. 6, 40 Stat. 415.)

"Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or allied enemy, * * * shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control * * * report the fact to the alien property custodian by written statement under oath containing such particulars as said custodian shall require. * * *

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, * * *.

"(c) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian, or the same may be seized by the alien property custodian; and all property thus acquired shall be held administered and disposed of as elsewhere provided in this Act.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered or paid over to the alien property custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the alien property custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the alien property custodian or by the Treasurer

of the United States. (Acts Oct. 6, 1917, c. 106, sec. 7, 40 Stat. 416; Nov. 4, 1918, c. 201, 40 Stat.)

"(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provded, however, that nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.* (Act Oct. 6, 1917, c. 106, sec. 8, 40 Stat. 418.)

"All moneys * * * paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

"All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him, except as hereinafter provided; * * *

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this

Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof * * *

"After the end of the war any claim of any enemy or of any ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct." (Acts Oct. 6, 1917, c. 106, sec. 12, 40 Stat. 423; March 28, 1918, c. 28, sec. 1, 40 Stat.)

It was prescribed in an Executive Order dated February 26, 1918, that,

"A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover * * *. Where demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to the possession of the money or other property demanded and such power or authority thereover as may be included within the demand and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the enemy Act' and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

The Act of March 4, 1923, amending the "Trading with the enemy Act," provides in part as follows:

"(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

"(9) An individual who was at such time a citizen or subject of Germany, Austria, Hungary, or Austria-Hungary, or who is not a citizen or subject of any nation, State, or free city and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of $10,000, or although exceeding in value the sum of $10,000 is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of $10,000: Provided, That an individual shall not be entitled, under this paragraph, to the return of any money or other property owned by a partnership, association, unincorporated body of individuals, or corporation at the time it was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder, * * *

"The Alien Property Custodian is directed to pay to the person entitled thereto, from and after the time this section takes effect, the net income, dividend, interest, annuity, or other earnings, accruing and collected thereafter, on any property or money held in trust for such person by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian, under such rules and regulations as the President may prescribe; but no person shall be paid under this section, any amount in excess of $10,000 per annum."

(Act March 4, 1923, c. 285, sections 1 and 2, 42 Stat. 1511.)

The courts have uniformly held that the statute of limitations is suspended in the case of enemies from the

commencement of a war to its termination, because the action could not be prosecuted during this period.

This rule has been applied in cases where the debt or property has not been seized, because after the termination of the war the courts were again opened to the litigants. However, where the debt or property is seized by the Government, as in the instant case, the restoration of peace does not necessarily remove the disability created by war, unless the Government immediately passes legislation for the return of the property. In the instant case, the disability continued until the effective date of the Winslow Act, March 4, 1923, when certain property rights were restored to the plaintiffs. Under this act a former enemy was entitled to the return of principal not in excess of $10,000.00 and annual income not in excess of $10,000.00 under the settlement of war claims Act of 1928, a return of 80 per cent of the principal was provided for. The courts recognize that the period to be deducted from any general statute of limitation is the period of the disability. This rule is uniform and should be applied in this case.

In *Borovitz v. American Hard Rubber Co.*, 287 Fed. 368, it was held that the wrongful death statute of Ohio requiring an action to be brought within two years after the date of the death was suspended during the war where the beneficiaries were alien enemies, and it was further held that an American administrator could not have maintained this action on their behalf during the period of the war. The decedent met his death on June 28, 1917, while employed by the defendant. No administrator was appointed or qualified until peace was declared, and this action was commenced on October 25, 1922.

District Judge Westenhaver, who delivered the opinion of the Court, held that the action could be maintained, and stated:

> "My conclusion is that defendant's contention cannot be sustained. In my opinion, the alienage and

disabilities of the beneficiaries suspended the running of the statute, even in a case of this character, during the war period, and that the usual rule requires an exception to be read into section 10773—1, G. C., and excluding from computation the period of the war. * * *

"The authorities need not be reviewed. The general principles are fully and sufficiently set forth in Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939. According to the principles of international law, an alien enemy is disabled during the war from seeking redress or communicating with this country; this disability suspends during the war both the right and the remedy; and an exception is, as a result of war, read into all general statutes of limitation to meet the disability created by war. It will be noted that the suspension is not merely of the remedy, but also of the right; that the alien enemy's debt and other property rights may be confiscated, seized, and impounded during a state of war; that the effect upon his right is the same as if it had been seized or impounded during the war and restored to him at the declaration of peace; and that the ordinary rule that a statute of limitations is suspended only when it pertains to the remedy, and is not a part of the right, has in this situation no basis upon which to rest."

In *Crawford et al. v. The William Penn*, Fed. Case No. 3,372, it was held that a trustee of an alien enemy could not maintain a suit during the legal disability of the enemy.

In *Sierra v. United States*, 9 Ct. Cls. 224, the Court said:

"The following language of the Supreme Court in the leading case of Hanger v. Abbott (5 Wall. p. 532) would seem to leave no room for further question on this point:

'Total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability, and opens the doors

of the courts. Absolute suspension of the right, and prohibition to exercise it, exists during war by the law of nations, and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitation is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons on which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law. Ability to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which made it his duty to abstain from any such attempt.'

"We give the claimant's intestate the full benefit of this exposition of the law, though in her petition she avers that he aided, encouraged and abetted the rebellion.

"If, then, the limitation prescribed by the Act of March 3, 1863, was suspended during the period of the rebellion, the next point to be determined is the date at which it became operative as against this claim. This was settled by the Supreme Court in the case of The Protector (12 Wall. p. 700) where it was held that the date of the Proclamation April 2, 1866, was the close of the war in the States therein mentioned of which Florida was one. Hence we assign to that date the beginning of the operation of the statute."

In *Hanger v. Abbott,* 6 Wall. 532 (1868), the plaintiff, a resident of New Hampshire, brought suit against the defendant, a resident of Arkansas, in the sum of $10,000.00 for goods sold. The defendant contended that the action was barred, since it was brought more than three years after it accrued. The plaintiff replied that while the action accrued on October 25, 1859, the courts of the State

wherein the defendant resided were closed to him by reason of the rebellion from May 6, 1861, to January 1, 1865. The court held that the period of the disability should be deducted from the three year statute and allowed recovery to the plaintiff.

Mr. Justice Clifford, who delivered the opinion of the Court in addition to the language previously quoted from this case, said:

> " * * * Views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during war, are revived on the restoration of peace, *unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war*, contrary to the milder rules of recent times. He says, in effect, that the power of confiscating such debts theoretically exists, though it is seldom or never practically exerted; that the right of the creditor to sue for the recovery of the debt is not extinguished; that it is only suspended during the war, and revives in full force on the restoration of peace. * * *
>
> "Grant that the law of nations is that debts due from individuals to the enemy may, by the rigorous application of the rights of war, be confiscated, still it is a right which is seldom or never exercised in modern warfare, and *the rule is universally acknowledged, that if the debts are not so confiscated, the right to enforce payment revives when the war has terminated.* * * *
>
> "Where a doubt has not been confiscated, the rule is undoubted that the right to sue revives on the restoration of peace, and Mr. Chitty say that with the return of peace we return to the creditor the right and the remedy. *Unless we return the remedy with the right, the pretense of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended.*
>
> " * * * *Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is*

universally admitted that if not confiscated during the war, the return of peace brings with it both 'the right and the remedy.'

"But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the union, if they are able to close the courts, and to successfully resists the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period."

In *Freeborn v. The Ship Protector,* 9 Wall. 687 (1870), a motion was made to dismiss an appeal on the ground that it was not brought within the time allotted by law. A libel was filed January 25, 1859, in the Southern District Court of Alabama on behalf of appellants residents of New York City for the price of certain materials furnished the ship in the Port of New York. A decree dismissing the libel was pronounced in December, 1859. This decree was affirmed by the circuit court on April 5, 1861. An apeal to the Supreme Court was not taken until July 28, 1869, more than eight years after the decree appealed from. By the 22d section of the Judiciary Act of 1789, it was provided that appeals must be brought within five years.

Mr. Justice Bradley, who delivered the opinion of the court, said:

"It is plain that by the literal terms of the Act of 1789 the period of limitation had expired more than three years prior to the taking of this appeal. But this court has decided, in the case of Hanger v.

Abbott, 6 Wall. 532, 18 L. ed. 939, that a Statute of Limitations did not run, during the rebellion, against a party residing in New Hampshire, so as to preclude his remedy for a debt against a person residing in Arkansas, one of the insurrectionary States. It is unnecessary to go over again the ground which was examined in that case. We are of opinion that the same law applies to this. And by throwing out of the eight years which elapsed between the decree and the appeal the four years and more during which the war continued, the time is reduced to a period of less than five years.

"But it is urged that the Act of March 2d, 1867, has regulated this subject, and has prescribed a limitation of one year from the passage of that Act within which to bring all appeals and writs of error which were suspended or interrupted by the rebellion. The terms of the Act are 'that where any appeal or writ of error has been brought to the Supreme Court from any final judgment or decree of an inferior court of the United States for any judicial district in which, subsequently to the rendition of such judgment or decree, the regular sessions of such court have been suspended or interrupted by insurrection or rebellion, such appeal or writ of error shall be valid and effectual, notwithstanding the time limited by law for bringing the same may have previously expired; and in cases where no appeal or writ of error has been brought from any such judgment or decree, such appeal or writ of error may be brought within one year from the passage of this Act.' 14 Stat. at L. 545. We are of opinion that this statute is an enabling and not a restraining one; that it was not intended to take away any right of appeal, but to continue the right in cases where it had been lost. 'Where the common law and a statute differ,' says Blackstone, 'the common law gives place to the statute; and an old statute gives place to a new one. * * * But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative.' 1 Bl. Com. 89. Such repugnancy does not exist here. Many cases may be supposed, in which the right of appeal

would be saved by the Statute of 1867, which would not be saved by the Act of 1789 and the operation of the common law rule followed in Hanger v. Abbott (*supra*). If four years of the five elapsed before the war, the right of appeal would be saved by the Act of 1867, but would be gone under the operation of the Act of 1789, unless the appeal were brought before the passage of the former Act. If Congress had intended to limit all appeals from courts in insurrectionary States to one year from the passage of the law it should have been so expressed in the Act."

In *Levy v. Stewart*, 11 Wall. 244 (1871), a suit was commenced on July 27, 1868, on certain notes all of which had matured in 1861. During the entire period of the rebellion from April 19, 1861, to August 20, 1866, the plaintiff resided in New York City and the defendant lived in Bayou Sara, Louisiana. The defendant claimed that the action was barred by the five year period of limitations, and further that the plaintiff still had time after the Rebellion came to an end to institute the suit within the five year period. The Court held, however, that the suit was brought in time as the period of the rebellion was to be deducted from the five year period.

Mr. Justice Clifford who delivered the opinion of the Court, said:

"Statutes of limitations exist in all the states, and with few exceptions they have been copied from the one brought here by our ancestors in colonial times. Story, Confl. L. par. 576. They are regarded as statutes of repose arising from the lapse of time and the antiquity of transactions, and they also proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period.

"Exceptions are to be found in all such statutes; but cases where the courts of justice were closed in consequence of insurrection or rebellion are not within the express terms of any such exception, contained

either in the original act or any other of later date.

"Express exceptions of the kind, it is conceded do not exist, and if none can be implied then all debts due from one belligerent to another, as well as executory contracts involving commercial intercourse with the enemy, are practically discharged, as, if the war is of much duration, prior claims will be barred by the local statute of limitations.

"Enemy creditors cannot prosecute their claims, subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any contract in the tribunals of the other belligerent.

"Absolute suspension of the right to sue and prohibition to exercise it exist during the war by the law of nations, but the restoration of peace removes the disability and open doors of the courts. * * *

"Peace, it is said, restores the right and the remedy, but it cannot restore the remedy if the war is of much duration, unless it be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited by the existence of the war and the law of nations from enforcing his claim. * * *

"Throughout the entire period between the dates of those proclamations the courts of the state were closed to the plaintiffs and they were totally incapable of instituting any suit for the enforcement of their claim. * * *

"Suppose that the rule of that court cannot be adopted, still it is insisted by the defendant that the suspension of the prescription ceased when the Rebellion came to an end; that the suit was instituted too late, as it might have been commenced within five years next after the cause of action accrued, and certain continental authorities are referred to where that rule is apparently maintained. 2 Troplong, De la Prescription, 258, etc.

"Authorities of the kind, though entitled to great respect, are not obligatory, and the court is of the opinion that the rule adopted in the case of Hanger v. Abbott, *supra*, is more consonant with justice and more in accordance with the analogies of our law

than the one suggested by those commentators. • • •

"*Where a debt has not been confiscated during war,* the rule is now universally acknowledged that the right to sue revives when peace is restored, and the rule is that the restoration of peace returns to the creditor both the remedy and the right, which necessarily implies that the law of limitation was suspended during the same period."

In *United States v. Wiley,* 11 Wall. 508 (1871), it was held that the whole period of the rebellion should be deducted from the statute of limitations in a suit by the United States on a bond. The cause of action accrued in 1860 and suit was not brought until February 15, 1869. The defendant was a resident of the State of Virginia. On June 11, 1864, Congress passed the following act:

"Wherever, during the existence of the present Rebellion, any action (civil or criminal) shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or the arrest of such person; or, whenever after such action (civil or criminal) shall have accrued, such person cannot, by reason of such resistance of the laws of such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be so beyond the reach of legal process, shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

The defendant in error contended that the statute of limitations was only suspended after June 11, 1864, pursuant to the above act. The Court held, however, that the above statute did not change the common law, and allowed the deduction of the whole period of the rebellion.

Mr. Justice Strong, who delivered the opinion of the Court, said:

"The purpose of the act of 1864 was manifestly remedial, to preserve and restore rights and remedies suspended by the war. Hence it is entitled to a liberal construction in favor of those whose rights and remedies were, in fact, suspended. The mischief it sought to remove would be but half remedied were it construed as contended for by the plaintiffs in error. It is not, therefore, to be admitted that the intention of Congress was to prescribe a deduction only of the time which might elapse after the passage of the act, during which it might be impossible to serve a process. On the contrary, we are of opinion that the statute requires all the time to be deducted during which the suit could not be prosecuted by reason of resistance to the laws, or interruption of judicial proceedings, whether such time was before or after its passage. * * *"

The Courts of the United States have been quite liberal in dealing with its former enemies. The rule is well settled that where the property of an enemy is not confiscated and the termination of a war restores both the right and remedy, the date of the termination of the war begins the operation of the statute of limitations. However, in the instant case the termination of the war did not restore the right and the remedy, because the property had been seized and no rights were restored until March 4, 1923, and hence that date should be assigned as the beginning of the operation of the statute.

While the Alien Property Custodian might have prosecuted a claim for refund within the four year period, the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, had no control over that officer and could not compel him to take action. He was only answerable to the President and Congress, and acted up until March 4, 1923, as the trustee of the United States. (32 Op. Atty. Gen. 249; *Adele Kahle*, 17 B. T. A. 633) At the time of the seizure of the property and prior to the Winslow Act of March 4, 1923, there was no assurance

that Congress would enact legislation for its return. If Germany had refused to set up machinery for the return of property which was seized from citizens of the United States, Congress would certainly have not legislated the return of the property seized from German nationals.

The Knox-Porter Resolution, declaring that the state of war with Germany had terminated with its passage as of July 2, 1931, incorporated as a part of the Treaty of Berlin, provided that:

> "All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America * * * shall be retained by the United States of America and no disposition thereof made * * * until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * since July 31, 1914, loss, damage, or injury to their persons or property * * *."

It would have been useless for the executors to file a claim for refund prior to March 4, 1923, because they did not have the legal ability to prosecute the same owing to the disabilities of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, and the fact that title to the taxes erroneously collected comprising a part of the residue of the estate was wholly in the Alien Property Custodian until March 4, 1923.

In any event it is submitted that the claim for refund of the Alien Property Custodian is not barred from allowance, because he is a branch of the United States and the statute does not run against the United States in the absence of Congressional enactment clearly imposing it.

In *Du Pont de Nemours & Co. v. Davis, Director General of Railroads, as Agent,* 264 U. S. 456, it was held that an action by the Director General of Railroads to recover a liability owing by the defendant for demurrage charges during the period of Federal control was one on behalf of the United States in its governmental capacity, and is subject to no time limitation. Mr. Justice Sutherland, who delivered the opinion of the Court, said:

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain', North Carolina R. Co. v. Lee, 260 U. S. 16, 67 L. ed. 104, 43 Sup. Ct. Rep. 2; Missouri P. R. Co. v. Ault, 256 U. S. 554, 65 L. ed. 1087, 41 Sup. Ct. Rep. 593; Northern P. R. Co. v. North Dakota, 250 U. S. 135, 63 L. ed. 897, P. U. R. 1919D, 705, 39 Sup. Ct. Rep. 502, 18 N. C. C. A. 878; Re Tidewater Coal Exch., 280 Fed. 648, 649); and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States (par. 12, 40 Stat. at L. 457, chap. 25). An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity (Chesapeake & D. Canal Co. v. United States, 250 U. S. 123, 126, 63 L. ed. 889, 892, 39 Sup. Ct. Rep. 407; Re Tidewater Coal Exch. *supra*), and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it (United States v. Nashville C. & St. L. R. Co., 118 U. S. 120, 125, 30 L. ed. 81, 83, 6 Sup. Ct. Rep. 1006; United States v. Whited & Wheless, 246 U. S. 552, 561, 62 L. ed. 879, 881, 38 Sup. Ct. Rep. 367). Statutes of limitation, sought to be applied to bar rights of the government, must receive a strict construction in favor of the government. United States v. Whited & Wheless, *supra.*"

In United States v. Nashville & Ry. Co., 118 U. S. 120, 125, it was held:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

In taking over the property of alien enemies, the Alien Property Custodian did so in a sovereign capacity, as a war measure, and is still acting in a sovereign capacity with respect to seized property.

Congress has given its consent to be sued to recover taxes illegally collected. The machinery which was set up to accomplish this was full and effective. The Government collected taxes from both citizens and aliens. It was not the purpose of Congress to discriminate between them in providing a remedy to recover taxes illegally collected.

Section 1316 of the Revenue Act of 1921, providing for a period of four years for filing claims for refund was a general statute of limitations, which did not run against former enemies during the period of their legal disability or against the Alien Property Custodian. The term "all," used in this section, meant all claims that a taxpayer had. This is probably the reason for the rule that in the ordinary case all grounds for refund must be specified to the Commissioner within four years. Section 1316 does not specify who should file the claim for refund, but certainly the respondents in this case have a sufficient interest to prosecute a claim for refund. The Commissioner has since the Winslow Act of March 4, 1923, refunded thousands of dollars to the Alien Property Custodian covering taxes

illegally collected. Where an executor has been discharged, as in this case, it is recognized that a claim for refund may be filed by persons entitled to receive the refund. (Art. 109, Regulations 37)

Conclusion.

In conclusion, it is respectfully submitted that under the law, the four year period of limitation for filing a claim for refund of taxes illegally collected, was suspended with respect to the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, from the time of the payment of the taxes on April 19, 1918 and September 10, 1918, until March 4, 1923, the date of the enactment of the Winslow Act, because any refund forms a part of their residuary estate which was seized by the Alien Property Custodian, and they were under a complete legal disability during this period, and that the four year period of limitation is inapplicable to the Alien Property Custodian.

Respectfully submitted,

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FREDERICK SCHWERTNER,
Of Counsel.

Dated at Washington, D. C., March 8, 1932.

APPENDIX "A".

COPY.

SOL:I:II
15-1-83

June 13, 1924.

In re: *Estate of Rosa von Zimmerman, deceased.*

DEPUTY COMMISSIONER ESTES:

Attention: Estate Tax Division.

Reference is made to your memorandum of March 16, 1924 (MT-ET-151-RRR), transmitting to this office the file in the above-entitled estate; the question at issue being whether the Alien Property Custodian is precluded by statute of limitations from obtaining the refundment of estate taxes paid by the executors of the decedent's will.

The facts are as follows:

The decedent, a resident of Los Angeles, California, died April 25, 1917. Her will provides that, after the payment of her debts, funeral expenses, the cost of administration and certain specific bequests, the remainder of the estate is to be divided equally among her three sisters, Frau Gertrude Luckhardt, Frau Ilka Wichmann and Frau Clara Kombst, who were and are citizens and residents of Germany. Walter F. Haas and Joseph Friedlander, residents of California, were nominated executors of the will. They qualified and performed their duties as such until October 26, 1922, when they were discharged. On April 19, 1918, they paid to the collector at Los Angeles the sum of $138,908.51, the amount of estate tax shown to be due by the return which had been filed by them. On June 12, 1818, A. Mitchell Palmer, as Alien Property Custodian, served written notice on the executors requiring them, under the Act of Congress approved October 6, 1917, and known as the "Trading with the enemy Act," to convey, transfer, assign and deliver to him as such Custodian all the right, title and interest of Gertrude Luckhardt, Ilka Wichmann and Clara Kombst in and to the estate of the decedent. The executors, however, continued with the administration of the estate, and on September 10, 1918, paid to the Collector an additional estate tax of $5,981.22. On September 29, 1922, Thomas W. Miller, Alien Property

Custodian, filed a petition in the proper court of California for distribution of the estate, and thereafter the part found to belong to the three named residuary legatees was delivered to him.

It is now claimed that the executors reported for tax certain of the assets at an excessive valuation, and, as a consequence, paid a larger tax than was rightfully due. Claims for the refunding of the alleged excess payment have been filed by the Alien Property Custodian and by the residuary legatees; the claim of the former having been filed February 1, 1924, and those of the legatees on December 27, 1923.

Under Section 3228 R. S., as amended by Section 1316 of the Revenue Act of 1921, all claims for refund of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any sum alleged to have been excessive, must be presented to the Commissioner within four years after payment of such tax or sum. Therefore, if this limitation of four years applies, the claims which have been filed in this instance cannot afford the basis of any refund, since their filing occurred subsequent to the expiration of the four-year period.

By Section 6 of the "Trading with the enemy Act," approved October 6, 1917, it is provided:

> "That the President is authorized to appoint, prescribe the duties of, and fix the salary * * * of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act."

Section 7 provides, subject to exceptions not here applicable, that, "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war * * *." Also, that,

"If the President shall so require, any money or other property owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing, or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Subdivision (c) of Section 6 provides that:

"The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation; *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law."

By Section 12 it is provided that all moneys paid to or received by the alien property custodian shall forthwith be deposited in the Treasury of the United States, and that,

"The alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any acts or things in respect thereof

or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."

It was prescribed in an Executive Order dated February 26, 1918, that—

> "A demand for the conveyance, transfer, assignment, delivery and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover, * * * Where demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to the possession of the money or other property demanded and such power or authority thereover as may be included within the demand and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the enemy Act' and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

The notice served by the Alien Property Custodian on the executors June 12, 1918, operated to divest the residuary legatees of, and to vest in the Alien Property Custodian, all their right, title, and interest in the estate. Whether he holds such interest as a trustee for the United States or for the residuary legatees is not necessary to be decided here. It is sufficient to say that he has had and now has the exclusive control and possession, and that such legatees have no interest in the estate, except that as

by an Act, approved March 4, 1923, and amending the 'Trading with the enemy Act', Congress has directed the Alien Property Custodian to pay to enemy aliens, in amounts not exceeding $10,000 in any one year, the net income, dividends, interest, and other earnings accruing on property taken from them by the Alien Property Custodian. But that amendment did not restore to such alien enemies any interest in the corpus of the estate seized by the Alien Property Custodian. Therefore, until Congress shall enact appropriate legislation, such alien enemies have no right or authority to demand and receive from the Alien Property Custodian or the United States property which, but for the Act, would have passed to them. It is, therefore, only necessary here to consider whether the refund claim filed by the Alien Property Custodian is subject to the bar interposed by section referred to, namely, section 1316.

In virtue of the maxim *nullum tempus occurit resi*, statutes of limitation do not, as a general rule, run against the sovereign or government. The rule, however, is otherwise where the government sues as a nominal party for the benefit of private persons. U. S. vs. Beebe, 127 U. S. 338; U. S. vs. Des Moines Nav. & R. Co., 142 U. S. 510; Curtner vs. United States, 149 U. S. 662. In the United States Ry. Co., 118 U. S. 120, it was held that a statute of limitations of a state did not affect the right of action of the United States upon negotiable bonds of a railroad corporation, purchased by the United States before maturity as an investment of money received from the sale of lands ceded to an Indian tribe, and held in trust for the tribe under treaty. Also in Trustees vs. Campbell, 16 Ohio St. 11, the holding was that the statute did not apply where the state was a trustee and the beneficiaries of the trust had no right to sue.

As stated in Levy v. Stewart, 11 Wall. 244, "Express exemptions of the kind, it is conceded, do not exist, and if none can be implied, then all debts due from one belligerent to another, * * * are practically discharged * * *. Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any contract in the tribunals of the other belligerent. Absolute suspension of the right to sue and prohibition to

exercise it exists during the war by the law of nations, * * * the effect of war is to suspend his right during its continuance, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy * * * is suspended by the two governments and by the law of nations not applicable at the date of the contract, and which came into operation in consequence of an event over which he has no control."

In Brown v. Miatts, 15 Wall., 184, it is said:

> "Statutes of limitation, * * * proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible. As is well said in the recent case of Semmes v. Hartford Insurance Company (13 Wall. 160), "The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but necessary legal logic that the one period should be taken from the other.'"

In Borovits v. American Hard Rubber Co., 287 Fed. 368, the court says, citing Hanger v. Abbott, 6 Wall. 332, that, "It will be noted that the suspension is not merely of the remedy, but also of the right, that the alien enemy's debt and other property rights may be confiscated, seized, and impounded during a state of war; that the effect upon his right is the same as if it had been seized or impounded during the war and restored to him at the declaration of peace; and that the ordinary rule that a statute of limitation is suspended only when it pertains to the remedy, and not a part of the right, has in this situation no basis upon which to rest."

On April 7, 1924, the Supreme Court held, in E. I. Du Pont De Nemours & Co. v. Davis, Director General of Railroads that the statute of limitations relied upon by the Du Pont Company did not apply, saying:

> "In taking over and operating the railroad system of the country the United States did so in its sover-

> eign capacity, as a war measure, * * *. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, * * * and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it. United States v. Nashville, etc. Ry. Co., 118 U. S. 120, 125; United States v. White and Wholess, 246 U. S. 552, 561. Statute of limitations sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government. United States v. White and Wholess, *supra.*"

Considering the genesis and purpose of the Trading with the enemy Act, its provisions, and the authorities herein cited, it is held that the Alien Property Custodian is not debarred by the provisions of section 1316 from claiming and receiving a refund of any excess payment of estate taxes.

Counsel, in whose favor powers of attorney were granted by the Alien Property Custodian and the residuary legatees, was orally heard April 4, 1924.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue.

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